Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Petitioners,

- against -

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P. and THE VARDE FUND IV-A, L.P.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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Dated: August 4, 1998

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QUESTION PRESENTED FOR REVIEW

Is a United States District Court empowered to issue a preliminary injunction prohibiting a defendant from transferring or assigning assets unrelated to the plaintiff's underlying claim and held outside of the court's jurisdiction in order to ensure that funds will be available to satisfy a potential money judgment?

LIST OF PARTIES

The defendants to the proceeding below were petitioners Grupo Mexicano de Desarrollo, S.A.; Desarrollo de Infraestructura, S.A. de C.V.; Obras Y Proyectos, S.A. de C.V.; Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. The plaintiffs to the proceedings below were respondents Alliance Bond Fund, Inc.; Alliance World Dollar Government Fund II, Inc.; Alliance Global Dollar Government Fund, Inc.; Elliot Associates, L.P.; Avalon Total Return Fund, L.P.; The Varde Fund, L.P.; The Varde Fund II-A, L.P.; The Varde Fund II-B, L.P.; The Varde Fund III-A, L.P.; The Varde Fund III-B, L.P. and The Varde Fund IV-A, L.P.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioners Grupo Mexicano de Desarrollo, S.A.; Desarrollo de Infraestructura, S.A. de C.V.; Obras Y Proyectos, S.A. de C.V.; Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. hereby certify that Grupo Mexicano de Desarrollo, S.A. is the corporate parent of the other named petitioners.

Grupo Mexicano de Desarrollo, S.A.'s non-wholly owned subsidiaries are:

GMD CBPO Construcciones, S.A.;
Consorcio Mexicano Constructor de Huites, S.A.;
Ecosys I, S.A. de C.V.;
Ecosys II, S.A. de C.V.;
Servicios Urbanos de Puebla, S.A. de C.V.;
Grupo Essagua, S.A. de C.V.;
Desarrollos Hidraulicos de Puebla, S.A. de C.V.;
Cooper T. Smith, S.A. de C.V.;
Carbonser, S.A. de C.V.;
Mexcarbon, S.A. de C.V.;
Desarrollos Hidraulicos de Guerrero, S.A. de C.V.;

Desarrollos Hidraulicos del Sureste, S.A. de C.V.;
Desarrollos Hidraulicos de Tam, S.A. de C.V.;
Desarrollos Hidraulicos de Aguascalientes, S.A. de C.V.;
Consorcio Ecoagua, S.A. de C.V.;
Operadora de Autopista del Golfo, S.A. de C.V.;
Autopista del Occidente, S.A. de C.V.;
Operadora de Autopista del Occidente, S.A. de C.V.;
Grupo Concesionario Metropolitano, S.A. de C.V.;
Vias Terrestres del Estado de Mexico, S.A. de C.V.;
Caminos Concesionados de Peajes de Morelos, S.A. de C.V.;
Compania Nacional de Concesiones, S.A. de C.V.;
Vias Concesionadas, S.A. de C.V.;
GIT Administracion de Autopistas, S.A. de C.V.;
Promotora Dowds, S.A. de C.V.;
Desarrollo de Infraestructura Y Vivienda, S.A. de C.V.;
Europlaza Mexico, S.A. de C.V.;
Inmobiliaria Real de la Presa, S.A. de C.V.;
Weinns Inmobiliaria, S.A. de C.V.;
Melinks de Mexico, S.A. de C.V.;
Grupo Promotor 2020, S.A. de C.V.;
Fideicomiso Grupo Diamante, S.A. de C.V.;
Fideicomiso Real Diamante, S.A. de C.V.;
Grupo Concesionario del Oeste, S.A.;
Latinoamericana de Ingenieria, S.A. de C.V.;
Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

Desarrollo de Infraestructura, S.A. de C.V.'s non-wholly owned subsidiaries are:

DINFRA Cofimex, S.A. de C.V.;
Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

Obras Y Proyectos, S.A. de C.V.'s non-wholly owned subsidiaries are:

OPSA Tenenge, S.A. de C.V.;
Obras Y Proyectos de Guatemala, S.A. de C.V.;
Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

Desarrollo Urbano Integral, S.A. de C.V.'s non-wholly owned subsidiaries are:

Autopistas de Guerrero, S.A. de C.V.

Desarrollo Industrial Latinoamericano, S.A. de C.V.'s non-wholly owned subsidiaries are:

Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL	5
II. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE POWER OF THE DISTRICT COURTS TO GRANT PRELIMINARY INJUNCTIVE RELIEF	8
III. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE RIGHTS OF CREDITORS	8
IV. THIS APPEAL PRESENTS AN ACTIVE CASE AND CONTROVERSY	10
CONCLUSION	11

TABLE OF CONTENTS—Continued

Page

APPENDIX

Opinion and Order of the United States Court of Appeals for the Second Circuit 1a

Order of the United States District Court for the Southern District of New York 22a

Transcript of Hearing Continuing Temporary Restraining Order 29a

District Court's Grant of Temporary Restraining Order 55a

District Court's Order of Judgment and Irrevocable Assignment 58a

Federal Rule of Civil Procedure 64 ..... 60a

Federal Rule of Civil Procedure 65 ..... 60a

TABLE OF AUTHORITIES

Cases Page

DeBeers Consol. Mines v. United States, 325 U.S. 212 (1945) 6, 7

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 6

Ebsco Indus., Inc. v. Lilly, 840 F.2d 333 (6th Cir.) *cert. denied*, 488 U.S. 825 (1988) 5

H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13 (2d Cir. 1963) 10

Home-Stake Prod. Co. v. Talon Petroleum, C.A., 907 F.2d 1012 (10th Cir. 1990) 5

Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186 (3rd Cir. 1990) 5

In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994) *cert. denied*, 513 U.S. 1126 (1995) 5

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1898) 5

Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507 (11th Cir. 1994) *cert. denied*, 513 U.S. 1146 (1995) 5

National Broadway Bank v. Sampson, 179 N.Y. 213 (N.Y. 1904) 8

Rosen v. Cascade Int'l, Inc., 21 F.3d 1520 (11th Cir. 1994) 5

Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986) 5

United States v. First Nat'l City Bank, 379 U.S. 378 (1965) 6, 7

Statutes:

Fed. R. Civ. P. 64 ..... 4, 6, 8

Fed. R. Civ. P. 65 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. ——

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Petitioners,

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ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P. and THE VARDE FUND IV-A, L.P.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Grupo Mexicano de Desarrollo, S.A., *et al.*, by their counsel, respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit entered on May 6, 1998 (App. 1a-21a)[1] which affirmed the order

[1] "(App.)" refers to pages in the annexed appendix.

of the United States District Court for the Southern District of New York entered on December 23, 1997. (App. 22a-27a).

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit was entered on May 6, 1998 (App. 1a-21a) and is reported at 1998 WL 220954 (2d Cir. May 6, 1998). The order of the United States District Court for the Southern District of New York was entered on December 23, 1997. The order of the District Court has not been reported. (App. 22a-27a).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on May 6, 1998 (App. 21a) and this petition is filed within ninety days of entry of that judgment pursuant to Supreme Court Rule 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Rules 64 and 65 of the Federal Rules of Civil Procedure. (App. 60a-63a).

STATEMENT OF THE CASE

This appeal addresses the outer limits of a federal district court's power to issue a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 65") restraining a defendant's use of assets unrelated to the plaintiff's underlying claim. The facts underlying this appeal are, however, plain and uncontested.[2]

[2] The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because the amount in controversy exceeded $75,000, exclusive of interest and costs, and the action was between citizens of a state and citizens or subjects of a foreign state.

Defendants, a consortium of Mexican construction companies ("GMD"), issued unsecured notes, approximately $82,000,000 of which were purchased by Plaintiffs. Defendants defaulted on an interest payment on those notes. Plaintiffs accelerated their right to receive principal payments and filed a complaint in the United States District Court for the Southern District of New York (the "District Court") alleging breach of contract. (App. 5a). Plaintiffs also sought a preliminary injunction to restrain the Defendants from assigning or transferring their primary asset—the right to receive in excess of $300,000,000 of unrelated notes to be issued to Defendants by the Mexican Government.[3] (App. 4a-6a). In seeking the injunction, Plaintiffs argued that injunctive relief was necessary to ensure that Defendants, who had already assigned to certain Mexican creditors their right to receive a portion of the government notes, did not make further assignments that might frustrate a potential judgment for Plaintiffs.[4] (App. 6a). Plaintiffs also cited the possible insolvency of the Defendants as justification for the injunction. (App. 25a). There was no suggestion that the assignments in favor of the preferred creditors (which had all been at deep discounts) were on account of anything other than valid debts of GMD. (App. 5a-6a, 26a). The District

[3] GMD is scheduled to receive the government notes as a part of the Mexican Government's efforts to compensate construction companies which have sustained losses as a result of their building and operation of toll roads throughout Mexico.

[4] In fact, Plaintiffs did not merely seek to ensure that they would receive equal treatment relative to other unsecured creditors. Rather, after prevailing on a motion for summary judgment, Plaintiffs sought and obtained from the District Court an order dated April 17, 1998 ordering that Defendants irrevocably assign to Plaintiffs a sufficient quantity of government notes to satisfy Plaintiffs' judgment. (App. 58a-59a). Defendants have appealed the propriety of that turnover order to the United States Court of Appeals for the Second Circuit. That appeal is pending.

Court granted Plaintiffs' motion for a preliminary injunction (App. 26a) and Defendants filed a notice of appeal on December 23, 1997.

On appeal to the Court of Appeals for the Second Circuit, GMD challenged the District Court's authority to issue a preliminary injunction prohibiting GMD from transferring or conveying arbitrarily selected assets held outside of the court's jurisdiction. In fact, GMD has no assets within the United States. GMD did not contest the District Court's findings of irreparable harm or the likelihood that Plaintiffs might ultimately prevail on the merits.

Under Fed. R. Civ. P. 65, a district court may enjoin a defendant's use of specific assets only if the plaintiff has a claimed equitable interest in the exact assets it seeks to enjoin. Such an injunction is inappropriate in a suit seeking fungible money damages. Plaintiffs' sole recourse is under Rule 64 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 64") which requires a district court to follow state law attachment statutes.

In affirming the District Court's grant of Plaintiffs' motion for a preliminary injunction, the Court of Appeals for the Second Circuit joined the Courts of Appeal for the First, Third, Sixth, and Ninth Circuits in authorizing the use of Fed. R. Civ. P. 65 to enjoin a defendant's unrelated assets for the purpose of securing funds to satisfy a potential money judgment. (App. 9a-15a). The Court of Appeals for the Second Circuit recognized that the Courts of Appeal for the Fifth, Tenth and Eleventh Circuits have rejected the use of Fed. R. Civ. P. 65 to encumber a defendant's use of assets which bear no relationship to the plaintiff's underlying claim. (App. 13a). Those courts have held that such use of Fed. R. Civ. P. 65 constitutes an impermissible end run around the more stringent state law provisions mandated by Fed. R. Civ. P. 64 (App. 7a-13a). The Court of Appeals for the Second Circuit did not attempt to reconcile the obvious split among the circuits.

REASONS FOR GRANTING THE WRIT

This appeal raises fundamental questions about the power of the federal district courts to grant preliminary injunctive relief under Fed. R. Civ. P. 65 to restrain the use of assets which bear no relationship to the subject of the plaintiff's underlying claim for the sole purpose of preserving assets to satisfy a potential money judgment. This case presents the Court with an opportunity to resolve an issue that has been the subject of much contention among the federal circuits.

I. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

This case raised an issue of first impression in the Court of Appeals for the Second Circuit. (App. 9a). As the court explicitly recognized, however, various other Courts of Appeal have addressed the issue of the district courts' power to grant injunctive relief and have reached inconsistent conclusions. (App. 13a). In affirming the decision of the district court, the Court of Appeals for the Second Circuit followed the holdings of the Courts of Appeal for the First, Third, Sixth, and Ninth Circuits which have sanctioned the use of Fed. R. Civ. P. 65 to preserve unrelated assets to secure satisfaction of an ultimate judgment.[5] The Courts of Appeal for the Fifth, Tenth and Eleventh Circuits, however, disagree.[6] Those

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[5] *See In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994) *cert. denied*, 513 U.S. 1126 (1995); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 208 (3rd Cir. 1990); *Ebsco Indus., Inc. v. Lilly*, 840 F.2d 333, 334-36 (6th Cir.) *cert. denied*, 488 U.S. 825 (1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986).

[6] *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir. 1994) *cert. denied*, 513 U.S. 1146 (1995); *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990); *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988).

circuits have expressly prohibited the use of Fed. R. Civ. P. 65 to preserve arbitrarily selected assets to satisfy a potential money judgment, insisting that Fed. R. Civ. P. 64 and state law attachment provisions provide the only remedy for a plaintiff seeking to ensure that assets unrelated to the underlying action will be available to satisfy a potential judgment.

The conflict among the federal circuits has arisen as the result of divergent interpretations of three decisions of this Court, *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940); *DeBeers Consol. Mines v. United States*, 325 U.S. 212 (1945) and *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965).

In *DeBeers Consol. Mines v. United States*, 325 U.S. 212 (1945), this Court held that a preliminary injunction may issue to secure assets for a final judgment only if the assets to be restrained are related to the underlying action. In *DeBeers*, the government sought to enjoin the defendant diamond mining companies from selling, transferring or disposing of any property in the United States until the court could adjudicate the government's claims. The government predicated its prayer for injunctive relief on the grounds that "[t]he principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent an enforcement of any order or decree which this court may render." *Id.* at 215. In reversing the lower court's issuance of the preliminary injunction, this Court held that

> [a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit.

Id. at 220. The *DeBeers* court distinguished its prior holding in *Deckert*, in which the Court upheld an injunction restraining the defendant's use of specific property which was directly related to plaintiff's securities fraud claim and which therefore would have been the subject of a final decree—a trust of common stocks that was created with funds that the plaintiffs were allegedly fraudulently induced to pay. Similarly, in *First Nat'l*, the United States sought to foreclose on a tax lien that previously had been placed on the New York bank accounts of a foreign tax debtor—it did not sue for money damages. In reversing the Second Circuit's reversal of the district court's issuance of an injunction restraining the bank from transferring any of the assets it held for the account of the tax debtor, the Court found that the ultimate relief sought in the litigation involved the very same bank accounts and held that "[u]nlike *DeBeers* . . . there is here property which would be 'the subject of the provisions of any final decree in the cause.'" *Id.* at 385.[7]

Those courts which have sanctioned the use of Fed. R. Civ. P. 65 to preserve assets for an ultimate money judgment have held that the limitation on the district courts' power enunciated in *DeBeers* applies only to circumstances in which the remedy sought by plaintiffs is injunctive relief. Under this analysis, *DeBeers* is inapplicable to cases in which a litigant seeks only money damages. The Courts of Appeal for the Fifth, Tenth and Eleventh Circuits, however, have held that, under *DeBeers*, an injunction may issue only to restrain the same "*res*" or "thing" as is the subject of the plaintiff's underlying equitable claim.

As a result of this well-defined split among the federal circuits, forum shopping is likely and repetition of the issue contemplated by this appeal is certain.

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[7] Importantly, the Court issued the injunction pursuant to its equitable powers under 26 U.S.C. § 7402(a), not Fed. R. Civ. P. 65. In addition, the Court held that "courts of equity may . . . go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *First Nat'l*, 379 U.S. at 382-83 (citations omitted).

II. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE POWER OF THE DISTRICT COURTS TO GRANT PRELIMINARY INJUNCTIVE RELIEF

Fed. R. Civ. P. 64 provides that provisional remedies, such as attachment, may be ordered consistent with the law of the state in which the district court sits. State law attachment provisions in New York (and all other states) do not, however, permit the encumbrance of assets located outside the state. *See National Broadway Bank v. Sampson*, 179 N.Y. 213, 222 (N.Y. 1904) ("No state can subject to its law either real or personal property which is out of its jurisdiction."). The decision of the Court of Appeals for the Second Circuit (and the courts of appeal whose decisions it has followed) authorizes the district courts to circumvent state law provisional remedies statutes by simply calling what is, in essence, a prejudgment attachment, an injunction. As a result, there ceases to be any discernible purpose for Fed. R. Civ. P. 64. Litigants can easily circumvent Fed. R. Civ. P. 64 by relying on Fed. R. Civ. P. 65 and its less stringent standards to freeze provisionally an adversary's extraterritorial assets, in direct contravention of state law. By expanding the authority of the district courts to issue preliminary injunctions under Fed. R. Civ. P. 65, the Court of Appeals for the Second Circuit has enhanced the judgment enforcement powers of the federal courts compared to those of the state courts of the states in which they sit, frustrating the intent of the Federal Rules of Civil Procedure to conform federal judgment enforcement remedies to those contained in state law.

III. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE RIGHTS OF CREDITORS

The error committed by the Court of Appeals for the Second Circuit will have serious and broad-based implications in the area of creditors' rights. In ordinary business dealings, a company, even an insolvent one, is free to pay any of its *bona fide* creditors to the exclusion of others until the company seeks (or is compelled to seek) the protection of the bankruptcy code. The Courts of Appeal for the Fifth, Tenth and Eleventh Circuits have permitted market forces and the prerogatives of the indebted entity to dictate priority of payment. In those jurisdictions, district courts cannot use their injunctive powers under Fed. R. Civ. P. 65 to interfere with a debtor's right to determine which creditors get paid first.

However, in sanctioning the District Court's use of Fed. R. Civ. P. 65 to preserve a defendant's unrelated assets to satisfy a potential money judgment, the Court of Appeals for the Second Circuit has created a powerful weapon for creditors seeking to improve their position vis a vis other creditors. Creditors in the First, Second, Third, Sixth, and Ninth Circuits can seek injunctions under Fed. R. Civ. P. 65 to obtain additional economic leverage over the indebted entity by ensuring that no other creditor is paid until the claim of the creditor who has obtained the injunction is satisfied. Disfavored creditors are ordinarily unable to obtain relief except through the bankruptcy code. The "possible insolvency" of the debtor is insufficient.

The Court of Appeals for the Second Circuit (and the courts of appeal whose decisions it has followed) has, in essence, given the District Court the power to act as a bankruptcy judge over parties and assets not currently before it and not within its ultimate jurisdiction. That is the "status quo" which the challenged injunction sought to preserve. The injunction restrained the Defendants from using substantially all of their assets for any purpose. Moreover, the proceedings in the District Court made clear that not even the smallest part of the Defendants' frozen assets would be released without giving Plaintiffs prior notice and an opportunity to object. (App. 53a). None of the Defendants' other creditors enjoyed this luxury.

Fed. R. Civ. P. 65 is not a substitute for a preference action or a fraudulent conveyance claim, and it has never been used for the purpose of protecting the interests of one creditor over other legitimate creditors who are not even before the district court. To arm the district courts with the power to determine arbitrarily the rights of parties not before it would alter the economic expectations of creditors and would constitute a perversion of the district courts' power to grant injunctive relief.

IV. THIS APPEAL PRESENTS AN ACTIVE CASE AND CONTROVERSY

Plaintiffs filed a "Suggestion of Mootness" with the Court of Appeals for the Second Circuit contending that Defendants' appeal was moot because the District Court had entered final judgment in Plaintiffs' favor. That "Suggestion of Mootness" was rejected by the Court of Appeals by order dated May 4, 1998.

The preliminary injunction at issue in this appeal, which was in effect for four months (from December 23, 1997 through April 17, 1998), seriously impaired Defendants' ability to continue their operations in the ordinary course of business and to restructure their debts and other financial obligations. If the decision of the Court of Appeals for the Second Circuit is reversed, Defendants will be entitled to damages that it can show resulted from the wrongful issuance of the injunction. *See, e.g., H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17-18 (2d Cir. 1963). The determination of whether Defendants suffered damages requires first that this Court determine whether the injunction was improperly granted.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

Dated: August 4, 1998

APPENDIX

APPENDIX

[Filed May 6, 1998]
[Entered June 3, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1812 August Term 1997

(Argued: Febuary 20, 1998 Decided: May 6, 1998)

Docket No. 97-9610

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

Plaintiffs-Appellees,

-v.-

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V.; and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants-Appellants.

Before: McLAUGHLIN, LEVAL, *Circuit Judges,* and POLLACK, *District Judge.**

Defendants appeal from an order of the United States District Court for the Southern District of New York

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* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

(Martin, *J.*), granting a preliminary injunction preventing them from dissipating, transferring, conveying, or otherwise encumbering the plaintiffs' right to receive or benefit from notes issued by the Mexican government. Because Judge Martin had the power to issue such an injunction and his findings are adequately supported by the record, we affirm.

AFFIRMED.

Richard A. Mescon, Morgan, Lewis & Bockius, New York, New York, *for Defendants-Appellants.*

Andrew J. Wertheim, Orrick, Herrington & Sutcliffe, LLP, New York, New York, *for Plaintiffs-Appellees* Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P.

Dale C. Christensen, Jr., Seward & Kissel, New York, New York, *for Plaintiffs-Appellees* Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc.

McLAUGHLIN, *Circuit Judge*

BACKGROUND

Grupo Mexicano de Desarrollo, S.A. ("GMD") is a Mexican holding company that, through its subsidiaries and joint ventures, constructs and operates roadways. From 1990 to 1994, GMD participated in the Mexican government's program to develop an intercity highway network. Under this program, the Mexican government granted concessions to build and operate toll roads to companies that were willing to arrange private financing for the construction of the roads. Due to economic uncertainty, currency devaluation and other factors, the revenues from toll road traffic fell below anticipated levels.

In February, 1994, in order to retire more than $100 million of high interest Mexican bank debt and to secure working capital to fund ongoing operations, GMD offered and sold to institutional investors $250 million of 8.25% notes due in 2001 (the "Notes"). The Notes are guaranteed by the five GMD subsidiaries named as co-defendants (collectively "Guarantors"). The Notes require GMD to pay interest at an annual rate of 8.25% on February 17 and August 17 of each year.

The Notes are "unconditionally and irrevocably" guaranteed by the Guarantors. Both the Notes and the Guarantees are unsecured obligations that rank *pari passu* with all other present or future unsecured and unsubordinated indebtedness of GMD. The Plaintiffs are eleven United States investment funds that purchased approximately $75 million of the Notes (collectively "the Investors").

Three years later, GMD experienced serious financial difficulty. In its annual report, filed with the SEC in June, 1997, GMD admitted that its liabilities now exceeded its assets. GMD expressed "substantial doubt" that it could

continue as a going concern. In August, 1997, GMD failed to make the interest payment on the Notes. The Guarantors similarly failed to step up and meet their obligations. Because of this default, the plaintiff-Investors caused acceleration of the principal.

Ten days later, the Mexican government came to the rescue by implementing the Toll Road Rescue Program. Mexico promised to issue government guaranteed Toll Road Notes to GMD and other toll road operators to reimburse them for unpaid construction receivables and expenses. In return for the Toll Road Notes, the Mexican government will eventually take over ownership and operation of the toll roads. Although the notes have not been distributed, GMD disclosed in its Third Quarter 1997 financial statement that it expected to receive $309 million in Toll Road Notes.

In addition to the debt owed to the Investors, GMD owed more than $450 million to other creditors. Its five largest creditors were the Mexican government, numerous Mexican banks, additional Mexican financial institutions, trade creditors, and terminated employees (collectively "Mexican Creditors"). Because the Mexican government's program would not fully alleviate its financial difficulties, GMD began to restructure its debt, reduce costs, and seek additional equity contributions. GMD undertook to negotiate with both the Investors and the Mexican Creditors to settle its financial obligations.

A Reuters report received by the Investors on August 27, 1997 revealed that GMD had begun to renegotiate its $256 million debt to the Mexican banks. GMD was asking for a 67% discount from the banks to match GMD's losses on the toll road investment. At the same time, GMD was also negotiating with the Investors to settle its obligations under the Notes.

One month later, the other shoe dropped. GMD issued a press release stating that during the first nine months

of 1997, it had revenues of approximately $119 million, but an expected loss of approximately $802 million. After totaling its assets and debts, GMD had a negative net worth of $214 million. To the alarm of the Investors, the press release also disclosed that GMB had already assigned $117 million in Toll Road Notes to settle other obligations—$100 million to the Mexican government to pay taxes and $17 million to pay severance packages to terminated workers in accordance with Mexican law. Although GMD did not have possession of the Toll Road Notes, it placed certain assets in "trust" for these creditors with the understanding that the encumbered assets would later be exchanged for Toll Road Notes.

On December 12, 1997, the Investors commenced an action in the United States District Court for the Southern District of New York (Martin, *J.*), alleging that GMD had defaulted on its obligation under the Notes. The Investors sought, *inter alia*, damages for GMD's breach of its contractual obligations under the Notes and a preliminary injunction restraining GMD from assigning the Toll Road Notes. By order to show cause, the Investors secured a temporary restraining order precluding the transfer or encumbrance of the Toll Road Notes. Judge Martin set a hearing on the motion for a preliminary injunction for December 19, 1997.

One day before the hearing, GMD filed its opposition papers. In an affidavit, GMD's Senior Vice President Jorge Zapata revealed that GMD had made additional, previously undisclosed assignments of $38 million in Toll Road Notes to the Mexican banks. The next day, during a break in the hearing before Judge Martin, the clouds further darkened. GMD gave the Investors a supplemental affidavit of Jorge Zapata stating that: (1) $137 million (and not the originally reported $100 million) in Toll Road Notes had been assigned to the Mexican government; (2) $30 million (not $17 million) in Toll Road

Notes had been assigned to former employees; (3) $48 million had been assigned to Mexican banks; and (4) $42.5 million had been assigned to other Mexican Creditors. Adding it all up, GMD had assigned between $214 million and $258 million of Toll Road Notes. GMD also planned to make still further assignments, leaving only $5.5 million in Toll Road Notes to satisfy the $75 million debt owed to the Investors.

Following a second hearing on December 23d, Judge Martin granted the preliminary injunction (under Fed. R. Civ. P. 65) restraining GMD and the Guarantors from dissipating, transferring, conveying, or otherwise encumbering the Investor's right to receive or benefit from the issuance of the Toll Road Notes. He determined that the Investors satisfied their burden for the issuance of a preliminary injunction because: (1) they would almost certainly succeed on their breach of contract claims against GMD; and (2) without the injunction they faced an irreparable injury since GMD's financial condition and its dissipation of assets would frustrate any judgment recovered. GMD now appeals.

DISCUSSION

I. *Power of the District Court to Enjoin the Use of Unrelated Assets*

GMD argues that, under Fed. R. Civ. P. 65, a district court is powerless to enjoin the use of a specific asset unless the plaintiff claims an equitable interest in the asset. Because the Toll Road Notes are unrelated to the Guarantee Notes on which the Investors brought suit, GMD contends that Judge Martin could not enjoin the transfer of Toll Road Notes. GMD believes that Fed. R. Civ. P. 64 is the only procedural mechanism to prevent a litigant from concealing or transferring assets in order to frustrate a potential judgment. The two Rules, however, are complementary, not mutually exclusive.

A. *Rule 64 and Rule 65*

Under Federal Rule of Civil Procedure 64, "all remedies providing for the seizure of the person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held." Fed. R. Civ. P. 64. The available remedies include arrest, attachment, garnishment, replevin, sequestration, and "other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action." *Id.* We have recognized that injunctive relief may be granted under Rule 64 if authorized by the applicable state law. *See In re Feit & Drexler,* 760 F.2d 406, 415 n.2 (2d Cir. 1985); *see also, Federal Deposit Ins. Corp. v. Antonio,* 843 F.2d 1311, 1313-14 (10th Cir. 1988) (enjoining use of assets under Colorado law); *cf. Chemical Bank v. Haseotes,* 13 F.3d 569, 572-73 (2d Cir. 1994) (affirming district court's denial of injunctive relief under N.Y. U.C.C. § 8-317(6)).

Federal Rule of Civil Procedure 65 establishes the procedure for securing preliminary injunctive relief in civil actions. The purpose of a preliminary injunction is to preserve the status quo between parties pending a final determination of the merits. *See Arthur Guinness & Sons, PLC v. Sterling Publ'g Co.,* 732 F.2d 1095, 1099 (2d Cir. 1984) (citations omitted). The court is vested with full discretion to determine whether to grant the injunction and its scope. *See Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.") (quotation omitted). However, we have noted that injunctive relief seeking to prohibit conduct outside of the district court's jurisdiction should be

"exercised with great reluctance." *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956).

All parties acknowledge that Judge Martin could not have enjoined the use of the Toll Road Notes under Rule 64 (and New York's injunction statute) because the Investors sought only monetary damages. Under New York law, "a preliminary injunction is . . . unavailable in an action for a sum of money only." N.Y. C.P.L.R. § 6301, Practice Commentaries (McKinney 1980) (Joseph M. McLaughlin) (citing *Campbell v. Ernst*, 19 N.Y.S. 123 (1892)). Furthermore, the use of New York's attachment statute would be unavailing because the Toll Road Notes are not located in New York State. *See National Broadway Bank v. Sampson*, 179 N.Y. 213, 222 (1904) ("No state can subject to its law either real or personal property which is out of its jurisdiction."); 12 Carmody-Wait 2d § 76.2, at 31-32 (1997) ("It is axiomatic that for property or a debt to be subject to attachment, the property must be amenable to the jurisdiction of the New York courts.").

The mere fact that the property lies outside the boundaries of New York State does not render the court powerless. If the court has personal jurisdiction over the defendant, and use of the court's injunctive power is appropriate, the court may order the defendant to bring the assets to New York or restrain the use of the assets. *See, e.g., Gresov v. Shattuck Denn Mining Corp.*, 215 N.Y.S.2d 98, 100 (N.Y. Sup. Ct. 1961) ("Where jurisdiction of the parties is assumed, this court may render an injunctive decree having extraterritorial effect in appropriate circumstances.") (citation omitted); N.Y. Jur.2d *Equity* § 14 (1986 & Supp. 1997) ("A court of equity may direct any defendant upon whom process has been served in New York to perform whatever acts are commanded in the decree, notwithstanding the fact that some or all of such acts may require performance outside of the

jurisdiction."); *cf. United States v. First Nat'l City Bank*, 379 U.S. 379, 384 (1965) ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States.") (citing *New Jersey v. New York City*, 283 U.S. 473, 482 (1931)). Therefore, Judge Martin had the power to issue the injunction.

B. *Standard of Review*

This Court reviews the district court's decision to grant a preliminary injunction for an abuse of discretion. *See Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 999 (2d Cir. 1997). The district court "abuses its discretion only if it applies an incorrect legal standard, bases the preliminary injunction on a clearly erroneous finding of fact, or issues an injunction that contains an error in its form or substance." *Id.* (citation omitted).

C. *Power of the District Court to Issue the Injunction*

This Court has approved the use of Rule 65 to freeze assets when those assets *are* the subject matter in dispute. *See Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986). Until now, however, we have not addressed whether the district court may issue an injunction to protect the plaintiff's right to recover monetary damages when there is a threat of defendant's insolvency or its dissipation of assets *not* directly involved in the pending litigation. The Supreme Court, likewise, has not squarely decided this question, although we read its precedents to suggest that a preliminary injunction should be available under those circumstances.

1. *Supreme Court Precedents*

GMD initially argues that *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), bars the

use of preliminary injunctions to freeze unrelated assets in any case seeking only monetary relief. This is too sweeping a reading of *De Beers*.

In *De Beers*, the government sued several foreign corporations and individuals for Sherman Act violations. While the ultimate relief sought was a permanent injunction, the government sought a preliminary injunction restraining the corporate defendants from transferring assets outside the United States. The government sought this interim relief to preserve its ability to seek civil contempt fines if the defendants later chose to flout the permanent injunction the government sought. *Id.* at 215. The Court held that the motion should have been denied, reasoning that the preliminary relief sought dealt "with a matter lying wholly outside the issues in the suit." *Id.* at 220.

The *De Beers* Court noted that the district court lacked power under the relevant federal laws to enter a money judgment—the only authorized remedy was an injunction against "future continuance of actions or conduct intended to monopolize or restrain commerce." *Id.* at 219-20. Because there was no possibility of an eventual money judgment, the district court could not issue an injunction freezing the use of assets. The Court expressly distinguished *De Beers* from a situation where the injunction prevented the transfer of "a fund or property which would have been the subject of the provisions of any final decree." *Id.* at 220 (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)).

GMD contends that the Toll Road Notes are unrelated to GMD's obligations to the Investors. Therefore, their argument runs, the Toll Road Notes are a "matter lying wholly outside the issues in the suit," and their transfer cannot be enjoined. The actual scope of the *De Beers* holding is far narrower than GMD asserts. *De Beers* "simply held that a defendant's money may not be encumbered by a preliminary injunction when the final

merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs. In short, *De Beers* is simply inapplicable to cases in which a litigant seeks money damages." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 197 (3d Cir. 1990); *see In re Estate of Marcos*, 25 F.3d 1467, 1478 (9th Cir. 1994); *Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 561 (9th Cir. 1992).

Limiting *De Beers* to cases where final equitable relief is all that is sought comports with the Supreme Court's other pronouncements concerning the availability of injunctive relief. In *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), plaintiffs sought an order enjoining the defendant from disposing of any assets pending the outcome of their damage action for fraudulent misrepresentation. Plaintiffs alleged that the defendant "is insolvent and threatened with many law suits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion." *Id.* at 285. The Court sustained the injunction because:

> the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. . . . As already stated, there were allegations that [defendant] was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against [defendant], without recourse to the fund . . . would be inadequate.

Id. at 290.

More recently, in *United States v. First National City Bank*, 379 U.S. 378 (1965), the Court upheld a preliminary injunction freezing assets in a suit seeking payment of back taxes. Although there was statutory authority to grant an injunction, the Court painted with a broader brush:

> Once personal jurisdiction of a party is obtained, the District Court has authority to order it to "freeze" property under its control . . . .
>
> . . .
>
> The temporary injunction issued by the District Court seems to us to be eminently appropriate to prevent further dissipation of assets. . . . Unlike [*De Beers*], there is here property which would be "the subject of the provisions of any final decree in the cause." [citing *De Beers*, 325 U.S. at 220]. We conclude that this temporary injunction is "a reasonable measure to preserve the status quo." [citing *Deckert*, 311 U.S. at 290].

379 U.S. at 384-85. The preliminary injunction freezing assets was thus upheld in order to assure the enforceability of an eventual money judgment.

Deckert and *First National* endorse the district court's exercise of general equitable power to ensure the preservation of an adequate remedy. *See United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 (4th Cir. 1989) (affirming the issuance of a preliminary injunction preventing the dissipation of assets where the plaintiff alleged that the defendant was insolvent and its assets were in danger of dissipation; rejecting defendant's argument that attachment proceedings under Rule 64 were required; this construes "too narrowly the Supreme Court's approval of the exercise of general equitable power to protect a plaintiff's right to recovery") (citing, *inter alia*, *Deckert*, 311 U.S. at 285); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir. 1987) ("The authority of a trial court to issue a preliminary injunction to ensure the preservation of an adequate remedy is well established.") (citing *Deckert*, 311 U.S. at 290).

It now seems to be settled in equity jurisprudence that a preliminary injunction is available to protect the plaintiff's right to recover monetary damages when there is a threat that the defendant will become insolvent or dissipate assets. For example, in *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 189 (3d Cir. 1990), the Third Circuit held that a preliminary injunction was authorized in "extraordinary circumstances" in a suit seeking only money damages, such as when there is a possibility that the defendant would be insolvent at the time of judgment. Similarly, the First Circuit, in *Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43, 52-53 (1st Cir. 1986), held that it lay within the district court's power to enjoin the defendant from disposing of assets when there was a danger that the defendant would become insolvent prior to judgment. *See, e.g., In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994). Concededly, not all Circuits agree. *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520 (11th Cir. 1994); *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988).

2. *Second Circuit precedent*

Capitalizing on this split of authority, GMD maintains that this Court's case law is consistent with the minority view espoused by *Rosen*. None of our cases cited by GMD align us with the minority view.

GMD cites *Republic of Philippines* to support its argument that we have restricted the application of Rule 65. However, *Republic of Philippines* stands for the unremarkable propositon that a federal court may enjoin the transfer of assets that constitute the subject matter of the dispute. 806 F.2d at 356. It is utterly silent on whether a district court may enjoin the transfer of *unrelated* assets.

GMD's reliance on *In re Feit & Drexler*, 760 F.2d 406 (2d Cir. 1985), is also off the mark. In *Feit & Drexler*, the defendant appealed a district court's injunction ordering the defendant to turn all her property capable of delivery over to an escrow agent. *Id.* at 409-10. The

district court, ignoring Rule 65, had issued the injunction under Rule 64 and New York's injunction statute. The defendant argued that the district court should have applied Rule 65 (which could not have been satisfied). Refusing to decide whether Rule 64 or Rule 65 should have been applied, we simply held that "the district court committed no reversible error since its findings and conclusions amply satisfied both the state test and this Circuit's test for the granting of preliminary injunctions." *Id.* at 415. In a footnote, we noted that Rule 64 and state law might "perhaps [be] required" for a prejudgment freeze of assets:

> If the mandatory injuncton here is a "remed[y] providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," the district court's application of the New York standard was entirely proper and perhaps even required.

Id. at 415 n.2 (citations omitted). We qualified this dictum, however, by noting that Rule 65 was an "appropriate" mechanism for prejudgment freeze of assets under certain conditions:

> [E]ven where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant "intended to frustrate any judgment on the merits" by "transfer[ring its assets] out of the jurisdiction. . . . [T]his is an appropriate case for the issuance of injunctive relief to prevent [the defendant] from making uncollectible any judgment the [plaintiff] may eventually obtain against her. . . . [W]ithout injunctive relief an eventual money judgment was likely to be "ineffectual" . . .

Id. at 416 (citations omitted).

In light of the Supreme Court's precedents indicating the broad scope of a district court's power to grant in-

junctive relief, we "join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment." *Estate of Marcos*, 25 F.3d at 1480.

We heed the Supreme Court's warning in *De Beers* that if injunctive relief is too freely granted, "[e]very suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree." *De Beers*, 325 U.S. at 222. We are confident, however, that this "parade of horribles" will not come tc pass. The defendant's rights are adequately protected because the traditional requirements for obtaining equitable relief must be met before a district court may issue an injunction. *See Hoxworth*, 903 F.2d at 197. We are also impressed by England's successful twenty-year history of issuing "Mareva injunctions" under circumstances substantially similar to those present on appeal. *See generally* Richard N. Ough, The Mareva Injunction and Anton Piller Order: Practice & Precedents (1987); Note, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. Pitt. L. Rev. 667 (1989) (discussing the value of Mareva injunctions and advocating that United States courts adopt similar rules for international commercial arbitrations).

II. *Irreparable Injury*

GMD contends that, even if Rule 65 applies, this Court requires that the defendants be acting with the intent to

frustrate an eventual judgment. Since Judge Martin did not specifically find that GMD intended to frustrate the Investors' right to receive an eventual recovery, the preliminary injunction was improper. GMD is wrong, as this would add a new mandatory element to equity jurisprudence.

It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant. *See Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994) (citations omitted). The showing of irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." *Citibank N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir. 1985) (quoting *Bell & Howard: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)).

GMD suggests that, in addition to the traditional requirements for a preliminary injunction, the movant must establish that the enjoined party harbored the intent to frustrate the recovery of an eventual judgment. This argument is without merit. The cases cited by GMD hold merely that one way to establish irreparable harm is to show that the defendant intended to frustrate the collection of an eventual judgment. *See, e.g., Pashaian v. Eccleston Properties, Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996) ("the irreparable harm requirement is satisfied in this case, which involves completed actions to frustrate a judgment"). We have never said that it is the only way and we decline to do so now.

Nor can GMD allege that Judge Martin abused his discretion by finding that the Investors would suffer an irreparable injury absent injunctive relief. Normally, in order to be classified as "irreparable," the threatened

harm must be a kind of injury for which a money judgment cannot compensate. *See, e.g., Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991). However, the district court may properly find that the threatened injury would be irreparable if, in the absence of an injunction, the movant would be unable to collect such a judgment. *See United States v. State of New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (judgment might be uncollectible because of Eleventh Amendment immunity).

Judge Martin found that the Investors would be irreparably harmed because "in light of Defendants' financial condition and dissipation of assets, any judgment Plaintiffs obtain in this action will be frustrated." Relying on *Chemical Bank v. Haseotes*, 13 F.3d 569, 573 (2d Cir. 1994) (per curiam), GMD contends that this is an insufficient showing of irreparable injury.

In *Haseotes*, we affirmed the denial of a motion for preliminary injunction restraining the defendant's transfer of assets. We held that irreparable harm does not exist merely because the defendant would render himself judgment-proof by engaging in the enjoined transaction. *Id.* We stated that an irreparable injury cannot be shown when the transferee legitimately sought to reduce debt and pay off creditors, rather than frustrate an eventual judgment. *Id.* at 573.

The plain import of Judge Martin's findings is that the actions of GMD were less than benign. He found that "GMD has stated that it plans to use the [Toll Road] Notes to satisfy Mexican creditors to the exclusion of Plaintiffs and all other holders of the Notes." This finding was adequately supported a statement from a GMD officer contained in the Confidential Appendix and a confidential payout schedule which indicated that, after the Mexican creditors were satisfied, GMD would have only

$5.5 million in remaining Toll Road Notes. Contrary to the legitimate business justification endorsed in *Haseotes*, Judge Martin clearly believed that GMD was improperly establishing a priority of creditors.

GMD's duplicity in disclosing the full extent of its assignments further supports this conclusion. GMD originally disclosed to the Investors that it assigned only $117 million in Toll Road Notes. During the course of the litigation, GMD revealed that it had actually assigned between $214 million and $238 million in Toll Road Notes. GMD's undisclosed transfers are not different in kind from the transfer of assets found to constitute an irreparable injury in *Pashaian v. Eccleston Properties, Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996) (pledge agreements that constituted part of an "unrelenting campaign to avoid paying obligations" and which left enjoined party without assets), and, again, in *Feit & Drexler*, 760 F.2d at 416 ("evidence of [defendant's] bond purchases and Swiss bank accounts, along with [the defendant's] repeated sworn testimony that she had no such assets" sufficient to justify issuance of injunctive relief).

It is particularly disingenuous for GMD to raise this argument on appeal. Judge Martin instructed the parties to prepare jointly a proposed order granting the preliminary injunction. GMD specifically objected to the proposed finding of fact that GMD's dissipation of assets would frustrate the Investor's ability to recover an eventual judgment. GMD argued that this finding "go[es] beyond what is sufficient to support an injunction." GMD should not be heard now to argue that this finding does not sufficiently support the injunction.

CONCLUSION

We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

[Filed May 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANG III
Clerk

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of May, one thousand nine hundred and ninety-eight.

Present: HON. JOSEPH M. MCLAUGHLIN
HON. PIERRE N. LEVAL
Circuit Judges
Hon. MILTON POLLACK
District Judge*

Docket No: 97-9610

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* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

Plaintiffs-Appellees,

v.

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V.; and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants-Appellants.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

By: /s/ Beth J. Neador
BETH J. NEADOR
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

DATE: May 6, 1998

Re: Alliance Bond Fund v. Grupo Mexicano De

Docket No(s).: 97-9610

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

AFFIRMED

Judgment was entered on *May 6, 1998,* and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form is enclosed herewith, and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17(8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours

GEORGE LANGE III, Clerk

By: /s/ Sheila E. Wilson
SHEILA E. WILSON
Case Manager, USCA

[Filed Dec. 23, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

WHEREAS, on December 12, 1997, Plaintiffs commenced this action by filing their Complaint seeking, among other things, a preliminary injunction prohibiting Defendants from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any Defendant's right to, interest in, title to or right to receive or retain any of the rights, receivables, notes or any other form of consideration, distributed or to be distributed to Defendants or Defendants' designees pursuant to the toll road ("Toll Road") rescue

plan established by the United Mexican States Ministry of Communications and Transportation under a decree dated August 27, 1997 (the "Government Notes");

WHEREAS, on December 12, 1997, this Court issued a Temporary Restraining Order, pending the determination of Plaintiffs' application for a preliminary injunction, prohibiting Defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any Defendant's right to, interest in, title to or right to receive or retain any of the Government Notes or proceeds thereof, and

WHEREAS, by Order To Show Cause signed by the Court on December 12, 1997 ("OSC"), the Court ordered that Defendants show cause before this Court on December 19, 1997, why the requested preliminary injunction should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure; and

WHEREAS, on December 19, 1997, this Court held a hearing on Plaintiffs' application for a preliminary injunction.

NOW, THEREFORE,

Upon consideration of the papers and evidence submitted by the parties, and the arguments of counsel, and all prior proceedings had herein, the Court finds that:

Defendant Grupo Mexicano de Desarrollo, S.A. ("GMD") is a Mexican holding company engaged in the construction business with its principal place of business at Carretera Mexico-Toluca 4000, Cuajimalpa, D.F. 05000 Mexico;

Defendants Desarrollo de Infraestructura, S.A. de C.V., Obras Y Proyectos, S.A. de C.V., Desarrollo Urbano

Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V. (collectively, the "Guarantors"), are Mexican corporations with their principal places of business at the same address as GMD, and are GMD's principal construction subsidiaries;

The OSC was duly served upon Defendants as provided therein, and Defendants, by their Legal Representative, Jorge Zapata, and their counsel, Morgan, Lewis & Bockius, have appeared to defend this action;

The Court has personal jurisdiction over each of the Defendants and venue is proper in this District;

On February 17, 1994, GMD issued $250 million of 8¼% Guaranteed Notes Due 2001 ("Notes");

The Notes are a valid corporate obligation of GMD that rank *pari passu* with all other present or future unsecured and unsubordinated debt of GMD;

The Guarantors unconditionally and irrevocably guaranteed the Notes;

Plaintiffs are U.S. investment funds and the beneficial owners of a total of $75,006,000 principal amount of the Notes;

The Notes bear interest at an annual rate of 8¼ percent, payable semi-annually in arrears in U.S. dollars on February 17 and August 17 of each year;

Defendant GMD failed to make the interest payment due on August 17, 1997, within five business days thereof, and has never made this payment;

The Guarantors have not paid the interest payment due on August 17, 1997;

An Event of Default of the type specified in Paragraph 7(a)(i) of the Note instrument has occurred and is continuing;

Plaintiffs have duly accelerated the maturity of the Notes beneficially held by them;

As of December 12, 1997, GMD and the Guarantors, jointly and severally, were indebted to Plaintiffs in the amount of $80,194,054, representing $75,006,000 in principal amount plus $5,188,054 in accrued and unpaid interest;

All conditions precedent to Plaintiffs' claim for breach of contract and the granting of the judgment requested have either occurred, been waived by Defendants or otherwise been satisfied, and Defendants have offered no defenses thereto;

Defendant GMD stated in its 1997 Report on Form 20K, filed with the United States Securities and Exchange Commission on June 30, 1997, that its ability to continue as a going concern is in substantial doubt;

On October 28, 1997, Defendant GMD reported that, for the first nine months of 1997 (based upon Mexican Generally Accepted Accounting Principals), it had a net loss of approximately $802 mililon, and a negative net worth of approximately $214 million;

Defendant GMD also reported that its current liabilities exceed its current assets;

Defendant GMD, in addition to the Notes, has in excess of $450 million of other creditor claims;

Given GMD's questionable ability to continue as a going concern, its continuing losses from operations in 1997, its negative net worth, its debt load and its inability to pay, as evidenced by the default on the Notes, its debts as they become due, GMD is at risk of insolvency if not already insolvent;

GMD has stated that it expects to receive at least $309 million of the Government Notes;

According to GMD's balance sheet as of September 30, 1997, the Government Notes represent 72 percent of its total current assets and 42 percent of its total assets;

The Government Notes thus are GMD's only substantial asset;

GMD has stated that it plans to use the Government Notes to satisfy its Mexican creditors to the exclusion of Plaintiffs and other holders of the Notes;

GMD has stated that it has encumbered certain Toll Road assets ("Receivables") for the benefit of certain Mexican creditors by placing Receivables in "trust" for those creditors, or otherwise assigning or encumbering such Receivables, with the intent that those specific Receivables will be exchanged for Government Notes once the Government Notes are issued;

In light of Defendants' financial condition and dissipation of assets, any judgment Plaintiffs obtain in this action will be frustrated;

Plaintiffs have thus demonstrated that, in the absence of the requested preliminary injunction, they will suffer irreparable injury and do not have an adequate remedy at law;

Moreover, the probability that Plaintiffs will succeed on the merits of their underlying claim for breach of contract is almost certain;

Alternatively, Plaintiffs have raised sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips decidedly in Plaintiffs' favor. Consequently,

IT IS HEREBY FURTHER ORDERED that, pending disposition of this action, Defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, are ENJOINED and RESTRAINED from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any Defendant's right to, interest in, title to or right to receive or retain, any of the Government Notes;

It is FURTHER ORDERED that nothing contained herein shall prohibit the defendants from commencing any insolvency proceedings under any applicable law.

Dated: New York, New York
December 23, 1997

/s/ John S. Martin, Jr.
UNITED STATES DISTRICT JUDGE

[Filed Dec. 12, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-v.-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

OPINION AND ORDER

JOHN S. MARTIN, Jr., District Judge:

In connection with the Court's order today granting a preliminary injunction against defendants, the Court orders that the plaintiffs post bond of $50,000.

SO ORDERED.

Dated: New York, New York
December 23, 1997

/s/ John S. Martin, Jr.
JOHN S. MARTIN, JR.
U.S.D.J.

[Filed Dec. 19, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., *et al.*,

Plaintiffs,

v.

GRUPO MEXICANO DE DESARROLLO,

Defendant.

December 19, 1997
9:50 a.m.

Before:

HON. JOHN S. MARTIN, JR.,

District Judge

* * * *

APPEARANCES

ORRICK, HERRINGTON & SUTCLIFFE
Attorneys for Elliot Associates LP
Avalon Total Return Fund, The Varde Funds

BY: ANDREW J. WERTHEIM,

BY: DUNCAN N. DARROW

SEWARD & KISSEL,
Attorneys for Plaintiff Alliance Bond Fund, Inc. et al.

BY: DALE C. CHRISTENSEN, JR.,
BY: JOHN J. GALBAN

MORGAN, LEWIS & BOCKIUS, LLP
Attorneys for Defendant

BY: RICHARD A. MESCON,

BY: GERALD M. FREEDMAN,

BY: JOHN E. FAILLA

[2] (In open court)

MR. WERTHEIM: Good morning, your Honor, my name is Andrew Wertheim, with Dale Christensen, who represents the Alliance Funds. We represent Elliot Associates, the Avalon Fund and the Varde Funds.

MR. CHRISTENSEN: Your Honor, I am going to share my argument with my colleague, since he's representing some different funds. And I will try to deal with the opening remarks, if I might, from the podium.

THE COURT: Sure.

MR. CHRISTENSEN: The relief we are asking here, your Honor, today is the same relief articulated in our papers seeking the order to show cause.

What we are asking, in addition to the relief sought therein, and that the Court was prepared to grant, is not only a continuance of those restraints, but also a direction by this Court to the defendants that they place the government notes that are about to be received by them, in some kind of trust established in accordance with Mexican law. And approved by this Court.

This trust, contrary to the suggestions—

THE COURT: I am going to start running things in Mexico?

MR. CHRISTENSEN: You are not going to be running things in Mexico. What you are going to be doing is using [3] the personal jurisdiction this court has over the parties with whom we have contracted to get them to do certain things, which we believe are not exclusively in our interest, but in the interests of all parties.

And I want to focus on that, if I might, because I think one of the important issues and sensitivities for

this Court is something that we tried to be sensitive to in terms of drafting the relief here. We are not asking this Court to become activists in Mexico, what we are asking is that a level playing field at least be permitted to be established in Mexico so that we can fight for our rights properly in Mexico, in the same way that any other creditors could.

We cannot do that at that point in time because of limitations under Mexican law, which are established in the affidavits we submitted in connection with our motion for a preliminary injunction.

We are not trying to establish any kind of possessory right in the assets in question here. And for that reason we believe a lot of the discussion regarding the relative merits of seeking an application for an attachment as opposed to a preliminary injunction are incorrect. And we believe also, and would ask the Court to focus on what we believe is the most dispositive authority on this issue, and that is Judge Sweet's decision in the Mason Tenders case, [4] which your Honor may have already read.

We believe that the law in that case makes clear that what we are doing here in terms of preliminary injunctive relief is totally appropriate. And, moreover, we believe that the standards that are established in this circuit are clearly met.

One of the most, I think, telling things in terms of the opposition papers which we received very late last night, was that there was really absolutely no contest on the issue of the fact that we are entitled to a judgment, or will be entitled to a judgment.

There has clearly been a default of substantial magnitude in the interest payments alone in August. The debts in question have concededly been accelerated and are currently due, and there is not a whisper of any kind of payment in progress.

Indeed, what we have is an acknowledgement by the defendant's attorneys that the same document which is attached as Exhibit, I believe, K to the Cramer affidavit, which they contend was a proposal submitted to us, and which we dispute that fact, indicates in the English translation that when all of these government proceeds are disbursed to the various Mexican creditors, that there will be a mere 5.5 million left for other creditors. And we are certain that the bond holders here are not the only creditors.

[5] So we believe that in terms of the standards in this circuit on the issue of probability of success, that these clearly have been met.

We also believe that irreparable harm can clearly exist. And the standard, again I would refer your Honor to Judge Sweet's decision in the Mason Tenders case, which is as recent as May of this year, establishes that irreparable harm, as we've demonstrated, is present in this instance. It is clear that the defendants are going to be unable to satisfy any money judgment that's submitted.

Indeed, in their most recent form 20(f), which they filed before the Securities & Exchange Commission, because this was a Eurobond offering, they state in that, and this is quoted at page 2 of our initial memorandum of law, the company's current liabilities exceed its current assets—

THE COURT: —I read the papers.

MR. CHRISTENSEN: And we believe that that establishes the predicate for insolvency. So we feel that the standards for a preliminary injunction is, as articulated by the Second Circuit, are clearly met here.

THE COURT: Mr. Mescon.

MR. MESCON: Good morning, your Honor.

Three points, I will just list them as topic notes first and then go into each one.

[6] First, Rule 65 does not authorize the Court to issue a preliminary injunction under the facts of this case.

Second, the delay of the defendants and their use of this Court's injunctive power as a ploy and negotiation belies the—

THE COURT: —any defense to their claims on the notes?

MR. MESCON: I have no idea—the hours since I learned of this, and I have been working on injunctive papers, on the pace—there have been notes that are not paid—

THE COURT: —appears to be a judgment—

MR. MESCON: —and this Court has jurisdiction over this action—that action. And there is certainly a good chance that in due course this Court will enter judgment for $75 million. And that judgment can take it to Mexico—

THE COURT: —and if they had a judgment they could get a restraining order, could they not?

MR. MESCON: In Mexico, I don't know the answer.

THE COURT: Here. If a party with personal jurisdiction here could be subject to a restraining order that doesn't allow them to dissipate their assets.

MR. MESCON: There are no assets in this jurisdiction in this—

[7] THE COURT: —the restraining order would restrain them from taking any action.

MR. MESCON: Right, and—

THE COURT: —anywhere.

MR. MESCON: And postjudgment, that could be the case, perhaps.

THE COURT: So that's the case postjudgment. We have got a case where there is no defense presented, why shouldn't I be able to provide them with the same relief?

MR. MESCON: Because, number one, your authority is limited by Rule 65. And while you might be able to issue an attachment under New York State law, an injunction, and a claim for money damages only, does not lie under these facts.

Second, the claim for irreparable injury does not justify the award of an injunction. And, third, there are lots of other parties over whom this court does not have jurisdiction—

THE COURT: —they are asking me to fashion a remedy that will protect those people's rights. They are saying, we got a debtor here who is absolutely liable to us, presents no defense, and the debtor wants to—

MR. MECON: —your Honor, they—

THE COURT: —you got to wait for me to stop, Sandi gets very annoyed. You don't want to get her mad at [8] you.

MR. MESCON: The notion that the debtor is going to dissipate the assets is not established here. The document which they rely on, which is a 408 document, given in the context of settlement discussions, was a proposal to them, it was a proposal that contained in it a requirement of their agreement before the transfers would take place. There is no notion of anybody going out in the dead of night and reassigning things.

The principal assignment of these notes, about which they complain, occurred in August of 1997, was disclosed in a public release in August of '97. For four months that hundred million dollar assignment has been known. The defendant—plaintiffs were well aware of it.

During the course of the negotiations the plaintiffs decided, essentially, to try and crank up the heat a little bit and have already, as of this moment, essentially prevented the defendants from disposing of what could be hundreds of millions of dollars for the purpose of running its ongoing operations. There is no capacity at all, the entire—a very substantial part of the cash flow of the defendants, like a Chapter 11 in Mexico, we've got the whole thing closed down, and it has been for a week. None of theses funds could be assigned, when they are received, they can't be spent. And what we have is a [9] situation where this court is going to be required to make decisions about whether wages can be paid, whether certain ongoing operations can be made, that really are not within the jurisdiction of this court. The other parties aren't before this court.

The Mexican FDIC, "fro pro ra bre" I think is how they say it, is not before this court. And this court has a contract action, it ought to decide it. And then judgment will be entered.

The Court's judgment will be entered and things will follow in the ordinary course.

To suggest that we are dissipating assets, the way that happened in Marcos, that we are stealing in the dead of night, this isn't so. There are ongoing negotiations, professional advisors on both sides, meetings are scheduled for early January, proposals and counterproposals have been exchanged. You see them attached as exhibits to our affidavit. Nothing being done on the sly, nothing is being done in a way to whisk away assets.

The authority of this court to protect rates, eventually judgment, is really designed for those situations where somebody is doing something, that's small W, wrong.

THE COURT: It seems to me that when you are dealing with the court's equitable power in this area, that

there is a balancing of factors that gets taken into [10] account.

If there were a serious question on the merits here, then perhaps the nature of the relief would require the Court to proceed with perhaps more caution. But when you have a situation where there is no defense on the merits, in an order that could clearly be entered, in my view, and you can disabuse me of that, if there were, in fact, a judgment, why should I delay entry of that judgment simply because the debtor is going to try to use the process of the court to delay entry of a judgment as to which there is no defense? Why is that equitable?

MR. MESCON: I guess first, the first response, is there a question about whether the court's equitable power reaches to a preliminary injunction when there is a claim for money damages only in this case. Leave that aside, that's in the papers. Second point, is—

THE COURT: —I think I have entered a judgment in those situations. When there has been a showing that the debtor is not going to be in a position to make payment.

MR. MESCON: When the subject matter of the dispute related to the action before the Court, perhaps, there was a breach like in the Marcos case, $5 billion, the subject was who owned them.

I don't know—but whether your Honor has done so, when the fund that has been attached bears no [11] relationship to the action that was before the court, and when the property was not within the state or the country.

THE COURT: Anyone my age relying solely on their memory is in jeopardy of error. My memory is that I have done it.

MR. MESCON: In addition, your Honor, that in this case, what the effect of the preliminary injunction

that's being sought here would be, would be to amount to a disruption of the orderly flow of the, what may amount to insolvency proceedings, or bankruptcy proceedings, or work out of one kind or another with all of the parties involved.

It's as if one of the parties, one of the many parties with an interest here, those parties include Mexican creditors, Mexican government, the Mexican people, the Mexican FDIC and the taxing authorities in Mexico, all have an interest in this, and for the last few months with the defendant—the plaintiffs' participation have been discussing and working through these issues.

Now, one of the parties now disrupts that orderly flow—

THE COURT: —possession is nine-tenths of the game. The defendants say we have the money and if you don't do what we want you to do, we are going to give that money to somebody else and leave you high and dry.

MR. MESCON: We haven't said that, your Honor, [12] the defendants have not said that.

And the documents that are attached to the moving papers, which was a settlement negotiation document, was—is not—is a proposal, it is not a statement of what we are going to do; hey, guys, this is our suggestion, what is your reaction to it. That's what that document was.

Indeed, the proposal of the other side is to set up what is called an appropriate Mexican trust. And the proposal involves five trustees, three of whom are not from either the plaintiff or defendant in this action.

How the Court will direct that the Mexican FDIC appoint a trustee to supervise in part the trusts that this Court might set up, are things that just shouldn't be done here.

There is an action here that there could be a judgment here. But essentially the reorganization proceedings,

which is what we are talking about, what we do in the equivalent Chapter 11 reorganization of a troubled company, is not something that ought to be under the supervision of this Court.

THE COURT: Suppose I simply enter an order that they are not to dissipate any funds other than in the ordinary course of business operations.

MR. MESCON: And limit it to the amount demanded in the complaint, with the interest that's accrued? Because [13] the Court's present order extends far beyond the ad damnum in the complaint.

May I have a moment, your Honor?

(Pause)

THE COURT: Sure.

MR. MESCON: We would recommend to our client that it accept that proposal.

THE COURT: Let me hear from the plaintiffs why that isn't sufficient under the day.

MR. WERTHEIM: Your Honor, it would be sufficient under the day, with one exception, the ordinary course of business we have to be careful. They have taken the positions in their papers already, your Honor, that the tax dissipation, the employee lien dissipation, and the emergency bank loan dissipation, have all been in the ordinary course. But what's behind each of those, the tax claim for 100 million was in settlement of a larger—

THE COURT: —let me suggest this, I have some people waiting for me on another matter, why don't you talk to each other and see if you can put that concept in mind. Work out some agreement.

It seems to me something that provides, and you can deal with ordinary course of business, it seems to me any transaction in excess of a certain amount would not be ordinary course. And that before any such transac-

tion would [14] take place, parties will be given adequate notice to come to court and we can deal with it on that basis.

MR. WERTHEIM: May I also suggest they look to their cash flow first before—

THE COURT: —talk to each other, see where you come out on that general concept. It does seem to me that this is a situation where the plaintiffs are entitled to some protection. On the other hand, there are more than the plaintiffs who are involved, and may ultimately end up in insolvency proceedings in Mexico.

I am not going to run Mexico from here. If I have to do that we will go down there. We are getting to that time of year where it will be pleasant.

MR. MESCON: We have to make sure the water in Cancun is still fresh.

THE COURT: I travel with my own water when I leave the country.

MR. WERTHEIM: Thank you, your Honor.

THE COURT: And why don't you come back to me after you have talked.

MR. CHRISTENSEN: Your Honor, may we stay here and have this discussion?

THE COURT: Sure, use the jury room.

(Recess)

THE COURT: Good afternoon. Where do we stand?

[15] MR. CHRISTENSEN: Your Honor, my name is Dale Christensen of Seward & Kissel.

We wanted to report that we discussed, at considerable length, this afternoon, with Mr. Mescon and his colleagues, the attempt to resolve this matter upon some kind of consent agreement. We consulted in good faith. I think it is fair to say that counsel made an effort, and

we were able in many instances to narrow areas of disagreement. But, unfortunately, during the course of the discussions we found out that, at least from our vantage point, the facts were, in fact, worse than we had expected. And we are, regrettably, not in a position to enter into such a consensual agreement.

We would, your Honor, urge the Court to enter an order.

And I believe Mr. Mescon might want to make some statement.

MR. MESCON: I believe counsel submitted a form of order. During the course of the day we had learned some slightly different factual information which we proposed to submit to the Court in a supplemental affidavit that we will serve, probably on Monday.

But summarizing it briefly, the gross amount to be distributed rather than being 305 million is 329 million. And the total amount of assignments that have been made [16] prior to the entry of the Court's temporary restraining order were a gross amount of 256 million, which was made on account of $214 million net of liabilities. So the balance remaining, as we understand it, is $53 million in notes gross, but 95 million in notes net after over-assignments are returned from taxing authorities and others.

Also, with regard to the form of the—form of the preliminary injunction, we believe, of course, believe that no preliminary injunction should be entered for the reasons set forth.

If your Honor is inclined to continue the temporary retraining order pending your determination of the preliminary injunction motion, we would propose that that temporary restraining order be modified so as to permit transfers in the ordinary couse of business to be defined merely as, with the approval and consent of the other side. And failing that, bringing the matter to your Honor's

attention rather than the blanket bar that exists in the proposed order that is being submitted to the Court.

MR. CHRISTENSEN: Your Honor, in that regard, I just want to make a few points. And your Honor may want to ask us some questions.

We do not favor having any exception for ordinary course transactions. Frankly, some of these additional assignments we found, which were very troubling, are not [17] assignments that we believe comply with the agreements. We are concerned that that kind of activity is continuing and, indeed, from our perspective, it makes the need for this injunctive relief all the more important and all the more imminent.

And we feel that any exceptions, other than in terms of ordinary course transactions, for these particular funds, which I might remind the Court, were designated to pay creditors, or any exception in terms of the amount that is covered by this, other than the amount that the government notes themselves total, we feel that perhaps encourages some more of these types of assignments, as my colleague used, which we frankly feel are violative of the agreement, and are the very kinds of things that we wanted to discourage from happening.

They're the types of transactions that are effecting the level playing field that we hope will be found by your Honor entering a preliminary injunction in the form that we recommended, which would include setting up some kind of fund that they, in turn, would have, you know, significant influence on. And it would be held in Mexico. But it would at least guarantee that the amounts of money in there would not be assigned over to other creditors, or other preferred creditors. In fact, we recognize your Honor may wish to enter its own order. We have prepared a draft [18] order and we have it on disk. And I can hand it up to the Court at this time.

THE COURT: Sure.

MR. CHRISTENSEN: And we have given a copy to our adversary.

THE COURT: Mr. Mescon, let me hear your comments.

MR. MESCON: First of all there are a number of the proposed findings of facts that are contained in the proposed order with which we take issue.

In reading it over the last five minutes, one that jumps out is on the top of page 5, in which the findings made that the note shall be secured equally and ratably with or prior to such indebtedness with certain exceptions, are not relevant here. We believe the exceptions are very relevant since principal asisgnment was for taxes, which we believe is one of the exceptions referred to in the order.

There is, I believe, other language in the proposed findings of facts that go well beyond what is either necessary for the determination of this motion or which—as to which there has been appropriate presentation of evidence in connection with the motion.

Leaving aside the proposed findings of fact for a moment, I believe that the decretal paragraph of the order, [19] number one, causes an undue hardship, is not limited to the minimum necessary to effectuate the purposes—

THE COURT: —what would do that?

MR. MESCON: That is balancing the hardships, a provision that would permit the defendant to continue to function, assuming your Honor were inclined to grant—

THE COURT: —counsel makes the point that these notes were not, these government funds were coming in, were to satisfy creditors, not to be operating funds.

MR. MESCON: That is a—the two points responsive to that, first, creditors mean all kinds of creditors. And the funds that are received are being used entirely appropriately in that regard.

And, second, it is impossible for the company to continue to function without access to some of these funds. And what that will be doing here, if this injunction is entered, is essentially precipitating, this may be the intent of plaintiffs, I don't know, but precipitating the insolvency—the bankruptcy of the defendants either in a Mexican bankruptcy proceeding or through repeated preliminary injunction applications in this court, with respect to the terms of the trust.

I think also the decretal paragraph with respect to an appropriate Mexican trust is, with respect, beyond the competence of the Court. The Court is not learned in [20] Mexican law. The trust—

THE COURT: —how do you know that?

MR. MESCON: I believe—I said with respect.

THE COURT: That assumes a fact not in evidence. It happens to be true.

MR. MESCON: The proposed form of trust, which is attached to the moving papers, provides a group of five trustees, three of whom this court does not have jurisdiction over.

This court does have jurisdiction over the trustee from the defendant and the trustee from the plaintiff, but there are trustees from Fobrick Proba, there are trustees from other creditors that are in the proposed form of trust that the defendants have—the plaintiffs have proposed that are not before this court.

This Court, I don't think, could compel them to serve as trustees.

The notion of this Court managing a trust in Mexico is not as an efficient use of either this Court's time or sensible in types of comity between the Court of the—of this court and in Mexico.

What really is, as the negotiations go forward over the next 30 days, the courts in Mexico sensibly are closed

till New Year's, so nothing is going to happen down there over the next two weeks. But as the—

[21] THE COURT: —more reason we should handle it, since we will be here. Mrs. Thomas never stops working.

MR. MESCON: We suggest that what we are going to have here is a deep involvement of this Court in what I anticipate will be a continued series of applications with regard to this subject matter. Unnecessarily.

I think that if we were—if the Court were inclined to grant a preliminary injunction, which again, we propose, if the order were to be more limited in the form of a restraint, like the temporary restraining order, with an exception in some form for ordinary course expenditures, that would be easier for the Court to enforce because the Court does have personal jurisdiction over the defendants and would not involve the Court in the operation and supervision of the Mexican law trust.

THE COURT: How would you define ordinary course?

MR. MESCON: Ordinary course would be defined as—the thought I had in mind is something not unlike what the United States bankruptcy code defines it as, would not be preferenced under our bankruptcy code, with a release valve that if there was ever a disagreement, then the Court could decide on some kind of basis, or a referee appointed by the Court, if the Court didn't want to do it himself. There are ways to do it that I hadn't really thought out, but something—

[22] THE COURT: —you think I prefer trying narcotics cases—

MR. MESCON: I dare say, after the third one you wouldn't want to entertain the application, what's the ordinary course.

There are some ways that would give a little more wiggle room for the defendant as it goes forward trying

to work this thing out over the next 60 days, which is really what, as a practical matter, this is won in 60 days, this would be all over, or—whether there will be a full-blown bankruptcy proceeding, or working it out.

MR. CHRISTENSEN: Your Honor, we are not trying to engage the Court in some kind of extraterritorial proceeding. All we are asking, if you look at the last paragraph, is that the defedants be directed to set up a trust in compliance under Mexican law. And all that this Court's involvement is is to approve the ultimate form of that, which we hope will have some consultations on. And as Mr. Mescon already probably knows, these types of trusts are not unusual. Indeed, we believe that some of the other creditors have been preferred, have been the beneficiaries of these types of trusts. So we are not talking about anything very monumental.

We are very concerned about this ordinary course loophole, because it seems to us, based on the history that [23] the position that they are advocating today, this loophole is large enough to drive trucks through, it is really interpreted by the defendants in a very broad way. And we have to, from our perspective, put an end to that.

The Mexican government in its bailout of these companies intended these funds, and I'd like Mr. Darrow, who is actively involved with the transaction, to just speak to that, to be used for creditors. It was not meant to be used for the operating budgets, they have other sources of revenue, they receive $10 million a month in terms of operating revenues, they are still in a position to run their business.

THE COURT: Let's assume they receive $10 million a month, and they have $12 million of bills, it seems to me they end up with $2 million in new creditors.

MR. CHRISTENSEN: That's true, your Honor.

THE COURT: And if those new creditors are supplying goods that are necessary to keep the company operating, it is essential that they be paid.

MR. CHRISTENSEN: Your Honor, we are not disputing that. And one of the reasons we've, you know, sought relief that does not just directly benefit us, but benefits, you know, the whole class of creditors, is to merely put ourselves in a position where we are treated equitably with the other creditors.

[24] What has happened to date, is that our investment interest in these companies has been discriminated against. And the only way we can protect ourselves is getting some kind of compulsion from this Court that the defendants who contracted with us, agreed to subject themselves to the jurisdiction of this Court, will at least treat us on an even playing field with the other creditors. That's all we are asking for.

MR. DARROW: Your Honor, if I could speak briefly. Duncan Darrow.

First of all, in terms of the—in the record as an attachment to our affidavits is the company's third quarter results for this year, 1997, financial results, which show for the third quarter of this year revenues of about 36 U.S. million dollars, about $10 million a month. So the company has some—

THE COURT: —that means nothing unless I know what the expenses are. People who make $133,000 a year, is a significant amount of revenue. But I will show you my expenses and prove to you it is not.

MR. DARROW: Secondly, in the defendant's affidavit in opposition to this motion, they talk about the fact that, quote, the controlling stockholders of this chain company, a name called Bi-stairios, is—as part of an overall restructuring, would invest a minimum of $50 million [25] in additional equity capital close quote. That's citing paragraph 28 of the Zapata affidavits submitted by the defendants.

So the controlling shareholders are prepared to invest $50 million, which I—it is fair to infer that this is a group of stockholders with a considerable wealth. And if there is some amount of monies that the company is in dire need of, that is simply a source of capital.

The other portion, when these receivables, and once they are swapped for government notes, government notes are, in effect, pledged to various select creditors, are part of our concern, the first thing it does, violates our contract rights under the fiscal agency agreement which governs our notes. It says that—it says, as to—there is a negative pledge, meaning that the issue of the bonds GMD cannot pledge away, assign away, encumber away its unencumbered assets without also securing the bond debt.

So the concept that in the ordinary course of its business the GMD should be entitled or somehow ought to be able to still utilize some of these notes violates our indisputable contract rights in the fiscal agency agreement, also a document submitted with our affidavit.

That has a very narrow exception for ordinary course, your Honor. And the ordinary course exception to the negative pledge—so-called permitted liens, in other [26] words encumbered, GMD can make in respect of its assets, the ordinary course exception, if you will, and I am reading from page 816 of the fiscal agency agreement, refers to, in connection with social security, workers compensation, employment insurance taxes and similar laws or regulations. In other words, if in the ordinary course of its business, there are some regulatory demands pursuant to which GMD must pledge or encumber assets, there is an exception here.

But as a general rule, I don't think GMD's counsel would dispute this, these kinds of assets cannot just be episodically pledged or encumbered away.

Last point, your Honor, about ordinary course of business. We await the supplemental affidavits, supple-

mental to what Mr. Zapata has told the Court in its sworn testimony in his affidavit, the statements in his affidavit today. But our concern, your Honor, is that, regrettably, the concept of this company operating in an ordinary way, and its ability to continue to operate in an ordinary way, is itself subject to question, quite apart from the fact it has already publicly stated that it is on the verge of insolvency.

What has happened, your Honor, in the discussion this is afternoon, is, we basically learn, in terms of these receivables, and what we thought had been pledged, and what we thought might be left over and encompassed by your [27] Honor's injunction, instead of about 155 million of receivables that had been already pledged or spoken for, some of which unfortunately we believe violated the negative pledge, it looks like 250 million have already been encumbered or spoken for. And there is only 209 totality. And we await this affidavit to explain these curious transactions.

But I think it is fair to say that the affidavit before the Court from Mr. Zapata speaking of 150-some million of receivables in one way or another already pledged, assigned or spoken for, is off by a factor of error of about $100 million.

And, you know, when a very senior member of management submits an affidavit off by $100 million on what is a very important issue, the concept that we should take comfort in them disposing of these assets in an ordinary course of business way, is unfortunately something that is very difficult for us to get comfortable with.

So that kind of exception, which they seem to be requesting to the injunctive order now before your Honor, is one that we, frankly, because of the events of today and prior, have a very difficult time getting comfortable with.

MR. MESCON: Just to clarify a couple of the instances of the differences between the figures we discussed this morning and those we know now.

[28] The largest single assignment was one that occurred in October 1996, more than a year ago, which assignment was not included in the list, it is not at all a recent assignment, it is an old assignment. There is about $40 million of difference between gross assignments and net assignments. That makes up $40 million of that difference. And there is $20 million more in the pot than we thought there was this morning.

So while I agree with counsel that I am sorry that we couldn't have presented a more accurate picture to the Court this morning in the affidavit, something that we will correct on Monday, there is no suggestion of any effort to conceal, obstruct, hide or otherwise obfuscate any of the facts that are present here.

And, indeed, in thinking about the negative pledges, some of the categories that counsel referred to are, some of the principal categories, are the assignments made here a long time ago, publicly, known to plaintiffs, for purposes like taxes, severance benefits that are arguably within the negative pledge.

And I guess one other thought, I believe that there are remedies that if this Court is inclined to issue an injunction, there are remedies that the Court could fashion that are easier for the parties and the Court than the one proposed by plaintiff, that get the bulk of what [29] plaintiff is looking for here without unnecessarily—

THE COURT: —for instance?

MR. MESCON: For instance, and in personon restraint without the creation of a trust to parties that are subject to the jurisdiction of the Court, restraining them, or injoining them from making distributions, with the exception either of ordinary course, or to make it simpler, even a liquidated sum, a sum of, for the sake

of argument, $5 million, and say that defendants may alienate $5 million of these things and not a penny more between now and February 28, for example. Hopefully by that time the whole thing will be over.

It doesn't require the involvement of the Court, it gives most but not all of what they are looking for, it ties up the bulk of what's out there, and it doesn't—it allows the company to operate as it tries to restructure over the next three months.

There is no magic to that number. Carve out a little piece.

THE COURT: What's wrong with that?

MR. CHRISTENSEN: Well, your Honor, one of the things, until we know more what the financial situation is, 5 million may be all that's there.

In fact, if you look at the proposal that's attached as K, they were suggesting to us on December, I [30] believe, 2nd, that if they made all of these other disbursements to other creditors, that there would be 5.5 million available to the U.S. bond holders on a $250 million bond obligation. I'm concerned. That 5 million may be the only asset left ,and I wouldn't want to agree necessarily that it could go out the door at this point. So we are really concerned.

I think that from our perspective the best thing that the Court can do at this point, is to try and solidify the current situation and prevent any further transactions disbursing efforts.

Obviously, if the defendants feel that they are entitled to use these funds for operating purposes, and we strongly disagree with that in terms of the government directives, they can come back to the Court and ask for some relief. We are not going to oppose that, obviously, if it is rational and reasonable. If there is some chance that this entity can survive and prosper, that's very much in our interest. We are in a very difficult situation here financially. So I don't see any objection coming for any reasonable proposal, and I think those kinds of things can be brought up if they need to be brought up.

THE COURT: What is the problem with, rather than creating a trust, which I have a little bit of concern with this Court, or setting up a foreign trust, simply keeping [31] the restraint on the defendants, they cannot dissipate any of this money subject to further order of the Court? That way the defendant, if they have a compelling need, can come back. In the interim, you can be working together and, obviously, you may be agreeable that certain necessary payments have to be made.

MR. CHRISTENSEN: Your Honor, you know, while that's not optimal, obviously, that's still very helpful to us, and we understand that.

We want to be clear here that you are talking about the—and counsel for the defendants has already acknowledged that they interpret the restraint in this way, that they include barring the transfer of receivables that the company holds, and for which the government, in a sense, is paying what we understand to be 100 cents on the dollar for bad receivables, that this bars them from assigning those receivables to other potential creditors. That's the vehicle that they've used to preferred creditors, because the way, at least that I understand the government's directives operate, that these notes are used to pay back those receivables.

And so as long as Mr. Mescon, and he's articulated earlier, he has no problem with that, continues to agree with that, that's, you know, while I said not optimal, it is still very helpful.

[32] MR. MESCON: I'm not 100 percent sure I understand it. The notion is, as our receivables come due we can't spend the cash generated by those? Then we have no money at all to do anything.

THE COURT: I take it what he's saying is you can't assign your receivables to other creditors. Am I correct?

MR. CHRISTENSEN: Yes.

MR. MESCON: But receivables mature, they become cash, and then the cash presumably could be spent. Or—if not, then there is nothing in the company. Because that's how companies get cash, by having receivables get paid.

THE COURT: But that's not in this particular fund.

MR. MESCON: Right.

MR. DARROW: There is—maybe counsel for GMD can clarify this—there is a group of receivables which relate towards, specifically, associated or specifically selected with the construction of toll roads.

It is not difficult to identify that batch of receivables, because we all know what work was involved, work on the toll roads. And it is that species or type of receivable very easily identified that GMD will receive these government issued notes in exchange for. There will be a swap of the so-called toll road receivables for the [33] so-called government notes.

And, in fact, to make it even easier to identify those receivables, GMD's toll road receivables were submitted to Price, Waterhouse last month for review and validation, basically to be sure they were okay, before the government exchange occurs.

What we are saying is that the scope of the injunction would prevent GMD from any disposition of the toll road receivables. A very readily identified type or kind of receivable.

If GMD built a bridge in Buenos Aires last month, and it has an invoice owing from the owner of that bridge for a million dollars, that is not the receivable that we seek to reach, obviously, in this injunction.

MR. MESCON: I guess I come back to suggesting that it is easier, instead of sorting out receivables, to carve out an amount. I think that the Court—

THE COURT: —I don't think it is. I mean, nice try, but my view is that it is appropriate to keep a restraint on these funds in place that, it seems to me, as I understand this receivable issue, the government is paying, since buying these receivables, that those receivables can't then be transferred to somebody else, or that rather than your clients getting the money, it goes to another creditor.

MR. MESCON: Our understanding is that the [34] receivables that are going to be exchanged for the government notes when the government notes are issued, are the very same thing, essentially, as the government notes. And the possession and the right to tender those receivables to the government is the same as having the government note. If that's the question, then—

THE COURT: —what I am going to suggest is the following, it is my view that it is appropriate to enter an injunction, basically preserve this fund and these notes, with the understanding that if that is something you can come back, Mr. Mescon, to seek any modification for, on the showing of some need in order to keep this company alive, on notice to your adversaries. That way we, hopefully, can basically preserve the issue status quo.

And what I am going to suggest you do is that you get together and see if you can't agree on a form of injunction to accomplish that end, since you know better than I all the magic words that should be used in that endeavor. Besides it makes my life easy.

MR. CHRISTENSEN: Your Honor, in that regard, until we have attempted to fashion that language, can the TRO continue?

THE COURT: Correct.

MR. CHRISTENSEN: And Mr. Mescon will notify his client that that continues.

[35] THE COURT: Correct. And I would suggest that you plan to—I suppose I can give you Monday to do that, and come and see me on Tuesday. How's that?

MR. MESCON: Fine.

MR. DARROW: One point of clarification, it is clearly understood, under the scope of the TRO, that it affects the toll road receivables as well as government notes, not the government notes—

THE COURT: I think that is very clear.

MR. MESCON: Yes.

MR. DARROW: I thought so, thank you.

THE COURT: So I am going to continue the TRO until next Tuesday.

MR. DARROW: Thank you, your Honor.

THE COURT: Mrs. Thomas, you are going to give us a time?

THE DEPUTY CLERK: 11:30.

MR. WERTHEIM: Your Honor, we have courtesy copies here of some papers that you got, the memo this morning, but we also filed some supplemental affidavits.

THE COURT: Okay. Tender them to Mrs. Thomas.

What I am simply going to do is endorse, on the copy of the original order to show cause that I have, that the temporary restraining order is continued until December 23.

[36] MR. MESCON: So we are now into the second ten-day period, correct? I want to make sure that we resolve the preliminary injunction issue by year end.

THE COURT: Absolutely.

Mrs. Thomas you can file that. Okay.

Have a pleasant weekend, Sandi.

[Filed Dec. 12, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARBE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A., DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINO-AMERICANO, S.A. DE C.V.,

Defendants.

ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

Upon consideration of the Summons and Complaint, the Declaration of Michael Kramer, executed on December 11, 1997 and the exhibits thereto, the Declaration of Mario Roberto Martinez Guerrero, executed on December 10, 1997, and the oral application of plaintiffs' counsel, and any defenses thereto:

I.

IT IS HEREBY ORDERED that defendants show cause before this Court, at Room 52, United States Court House, 500 Pearl Street, New York, New York, on December 19, 1997, at 9:30 o'clock in the a.m. thereof, or as soon thereafter as counsel can be heard, why a preliminary injunction should not be issued herein pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, pending the final determination of this action, from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any defendant's right to, interest in, title to or right to receive or retain, any rights, receivables, notes or any other form of consideration, distributed or to be distributed to defendants or defendants' designees pursuant to the toll road rescue plan established by the Mexican Ministry of Communications and Transportation under a decree dated August 27, 1997 (the "Government Notes") and requiring Defendants to deposit the Government Notes into an appropriate trust established under Mexican Law and approved by the Court.

II.

IT IS HEREBY FURTHER ORDERED that, pending the determination of plaintiffs' application for a preliminary injunction, defendants their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, are temporarily restrained and enjoined from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any defendant's right to, interest in, title to or right to receive or retain any of the Government Notes or proceeds thereof.

III.

IT IS HEREBY FURTHER ORDERED that no bond is necessary since the status quo is being maintained pending a determination of plaintiffs' motion for a preliminary injunction.

IV.

IT IS HEREBY FURTHER ORDERED that service of this Order to Show Cause shall be effective when plaintiffs deliver a copy of this Order to Show Cause, together with a copy of the papers in support thereof, upon local counsel for defendants, Messrs. Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, NY 10022, or CT Corporation System, 1633 Broadway, New York, NY, defendants' duly appointed agent for service of process, by hand, Federal Express or other overnight delivery service, on or before, December 13, 1997.

V.

IT IS HEREBY FURTHER ORDERED that, pending further order and for good cause shown, plaintiffs' application to file certain documents containing confidential and nonpublic information relating to defendants is hereby granted, and the Clerk of the Court is hereby directed to accept such documents and maintain them under seal.

VI.

IT IS HEREBY FURTHER ORDERED that answering papers, if any, shall be served by hand upon counsel for plaintiffs, and supplied to the Court, no later than 5 o'clock p.m. on December 18, 1997, and reply papers, if any, shall be similarly served and supplied to the Court no later than December 19, 1997.

Dated: New York, New York
December 12, 1997

Issued: 2:00 p.m.

/s/ John S. Martin, Jr.
United States District Judge

[Filed Apr. 17, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

- against -

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A., DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

JUDGMENT
98,0893

The Court having granted Plaintiffs' (1) motion pursuant to Fed. R. Civ. P. 56(c) for an award of summary judgment on their claim against Defendants for breach of contract, (2) motion pursuant to Fed. R. Civ. P. 12 (b)(6) to dismiss with prejudice Defendants' counterclaims, and (3) motion for an order directing Defendants to irrevocably assign or transfer to Plaintiffs a sufficient amount of toll road Receivables or Government Notes to satisfy this Judgment;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants shall pay Plaintiffs the sum of $82,-323,936 as of April 10, 1998 together with interest accrued to the date of this Judgment at the rate of $17,189 per day for a total sum of $82,444,259;

2. Defendants irrevocably assign or transfer to Plaintiffs within 10 business days hereof a sufficient amount of toll road Receivables or Government Notes to satisfy this Judgment;

3 (a) Pending such assignment or transfer, the restraints as stated in the preliminary injunction order issued on December 23, 1997 is converted into a permanent injunction effective until defendant complies with paragraph 2 above.

* * * *

4. This Court shall retain jurisdiction for the purpose of implementing this Judgment, including, but not limited to, the assignment or transfer of toll road Receivables or Government Notes as ordered herein, and the enforcement of all injunctive relief accorded by the Court in connection with this Judgment.

Dated: New York, New York
April 17, 1998

/s/ Hon. John S. Martin, Jr.
HON. JOHN S. MARTIN, JR.
United States District Judge

This Judgment Was Entered on the Docket on _____.

RULES OF CIVIL PROCEDURE

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits

becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order

without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of

Congress to be heard and determined by a district court of three judges.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)